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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1994

LINUS DUANE ROMERO, SR. and
DARLENE ROMERO
Petitioners,

versus

K-MART CORPORATION, d/b/a
K-MART DISCOUNT STORE NO 7061
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
of Linus Duane Romero, Sr. and Darlene Romero

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QUESTIONS PRESENTED FOR REVIEW

Does a court of appeals commit reversible error when it reviews a district court's determination of state law under the deferential "abuse of discretion" standard, rather than under the plenary *de novo* standard mandated by this Court's decision in *Salve Regina College v. Russell*, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991)?

LIST OF PARTIES

The following are parties to this proceeding:

Duane Linus Romero, Sr.
Plaintiff-Petitioner

Darlene Romero
Plaintiff-Petitioner

K-Mart Corporation
Defendant Respondent

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TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW 1

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

DECISIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 2

ARGUMENT 3

CONCLUSIONS 14

APPENDIX

App. A A-1
App. B A-8
App. C A-10

TABLE OF AUTHORITIES

CASES Page

Bennett v. Soo Line Railroad Co., 35 F.3d 334, 336, n.4 (8th Cir. 994) 5

Craddock v. Immigration & Naturalization Service, 997 F.2d 1176, 1179 (6th Cir. 1993) 6

Entrevia v. Hood, 427 So.2d 1146, 1148 (La. 1983) 5

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1930) 9

Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976) 12

Folks v. Kirby Forest Industries, Inc., 10 F.3d 1173 (5th Cir. 1994) 6,7,8

Hans Construction Co. v. Phoenix Assurance Co. of New York, 995 F.2d 53, 55 (5th Cir. 1993) 6

In re Rasbury, 24 F.3d 159, 166 (11th Cir. 1994) 6

Interstate Power Co. v. Kansas City Power & Light Co., 992 F.2d 804, 807 (8th Cir. 1993) 6

Jackson v. Taylor, 912 F.2d 795, 798 (5th Cir. 1990) 9

Kent v. Gulf States Utilities Co., 418 So.2d 493 (La. 1982) 5

TABLE OF AUTHORITIES (continued)

CASES Page

Klonowski v. International Armament Corp., 17 F.3d 992, 995 (7th Cir. 1994) 6

Labiche v. Legal Security Life Insurance Co., 31 F.3d 350, 351 (5th Cir. 1994) 6

LeBlanc v. K-Mart Corp., 1993 WL 262645 (E.D. La. 1993), affirmed, No. 93-3503 (5th Cir. 1994) 10,11

Lutheran Medical Center of Omaha, Nebraska v. Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan, 25 F.3d 616, 620 (8th Cir. 1994) 5

Nance v. Gulf Oil Corp., 817 F.2d 1176 (5th Cir. 1987) 5

Nesom v. Tri Hawk International, 985 F.2d 208, 209 (5th Cir. 1993) 7

Olsen v. Shell Oil Co., 365 So.2d 1285 (La. 1979) 5

Pierce v. Underwood, 487 U.S. 552, 557-63, 108 S.Ct. 2541, 2546-49, 101 L.Ed.2d 490 (1988) 5

Resolution Trust Corp. v. United States Fidelity & Guaranty Co., 27 F.3d 122, 125 (5th Cir. 1994) 6

Ross v. La Coste De Monterville, 502 So.2d 1026, 1028 (La. 1987) 5

TABLE OF AUTHORITIES (continued)

CASES Page

Salve Regina College v. Russell, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) ..... passim

Schexnider v. Winn Dixie Louisiana, Inc., 490 So.2d 1095 (La.App.3rd Cir. 1986), writ denied 491 So.2d 381 (La. 1986) 11

Sheppard & Enoch Pratt Hospital, 32 F.3d 120, 124 (4th Cir. 1994) 5

Whitley v. Albers, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986) 12,13

Wilfong v. U.S., 991 F.2d 359, 364 (7th Cir. 1993) 6

Wilson v. Seiter, 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991) 12,14

STATUTES

28 U.S.C. 1254(1) 1

28 U.S.C. §1332 2

28 U.S.C. §1441 2

28 U.S.C. § 2101(c) 1

Rule 47.5, Local Rules of the Fifth Circuit 9,12

TABLE OF AUTHORITIES (continued)

Page

STATUTES (continued)

Louisiana Civil Code Article 2317 . . . . . passim

Louisiana Revised Statutes 9:2800.6 4,10

DECISIONS BELOW

The decision of the United States Court of Appeals, Fifth Circuit, is unpublished but is reported at 44 F.3d 1005 (5th Cir. 1995) and 48 F.3d 533 (5th Cir. 1995).

The unpublished decision of the Court of Appeals and the unreported decision of the District Court are reproduced in the appendix.

JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals, Fifth Circuit, entered on January 5, 1995. After its entry, Plaintiffs petitioned for rehearing and/or rehearing *en banc.* On February 15, 1995, the Court of Appeal denied the Petiton for Rehearing with no member of the panel or Judge in regular active service on the court requesting that the court be polled on rehearing en banc.

This Petition is timely filed pursuant to 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED IN THIS CASE

Louisiana Civil Code Article 2317:

Art. 2317. Acts of others and of things in custody

We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications.

STATEMENT OF THE CASE

Linus Romero, Sr. and his wife, Darlene Romero, residents of the State of Louisiana, brought this civil action against K-Mart Corporation to recover damages resulting from injuries suffered by Linus Romero, Sr. when he slipped on motor oil and fell in K-Mart's retail store in New Iberia, Louisiana. Plaintiffs filed their claims in the Sixteenth Judicial District Court in and for the Parish of Iberia, State of Louisiana, and K-Mart subsequently removed them to the United States District Court for the Western District of Louisiana pursuant to 28 U.S.C. §§ 1332 and 1441.

Plaintiffs' claims were tried before a jury on November 17, 1993 through November 19, 1993. At the close of the trial, the trial judge instructed the jury on Plaintiffs' negligence theory but refused to give requested instructions on their theory of strict liability under Louisiana Civil Code Article 2317. In response to special interrogatories, the jury found that K-Mart was not negligent. In accordance with the jury verdict, a judgment was rendered by the District Court on November 19, 1993,

dismissing Plaintiffs' claims at their costs. Plaintiffs filed a timely Motion for a New Trial pursuant to Rule 59 of the Federal Rules of Civil Procedure, which was denied in a written ruling on March 25, 1994.

Plaintiffs perfected an appeal to the United States Court of Appeals, Fifth Circuit on April 20, 1994. The matter was assigned to the appellate court's summary calendar, and on January 5, 1995, the judgment of the District Court was affirmed in an unpublished *per curiam* decision. Plaintiffs' application for rehearing and/or rehearing *en banc* was denied on February 15, 1995 with no member of the panel or Judge in regular active service on the court requesting that the court be polled on rehearing en banc.

ARGUMENT

This matter, like *Salve Regina College v. Russell*, 499 U.S. 225, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991) involves a District Court's determination of state law, which was implemented in its instructions to the jury. In *Salve Regina College v. Russell*, supra, the district court submitted the plaintiff's breach-of-contract claim to the jury with appropriate instructions on the substantial performance doctrine, because it determined that Rhode Island law supported the application of that doctrine to the contract at issue in that case. In this case, the District Court refused to instruct the jury on Plaintiffs' strict liability theory of recovery under Louisiana Civil Code Article 2317, because it found that Louisiana law did not support the application of that provision to the particular facts of this case.

The District Court charged the jury that Plaintiffs had to prove that K-Mart "either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence. . . ." Plaintiffs did not object to the District Court's instruction in so far as it related to their negligence theories under La.R.S. 9:2800.6.[1]

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[1] La.R.S. 9:3800.6 provides:

§ 2800.5. Burden of proof in claims against merchants

A. A merchant owes a duty to persons who use his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonaable effort to keep the premises free from any hazardous conditions which reasonably might give rise to damage.

B. In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained because of a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, and in addition to all other elements of his cause of action, that:

(1) the condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable;

(2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence; and

(3) The merchant failed to exercise reasonable care.

C. Definitions:

(1) "Constructive notice" means the condition existed for such a period of time that it would have been discovered if the merchant had exercised reasonable care.

(2) "Merchant" means one whose business is to sell goods, foods, wares, or merchandise at a fixed place of business.

(D) *Nothing herein shall affect any liability which a merchant may have under Civil Code Arts.* 660, 667, 669, *2317,* 2322 or 2695. [emphasis added.]

However, they requested that the jury also be instructed under Louisiana Civil Code Article 2317, which imposes strict liability on the owner and/or custodian of a defective thing.[2] The trial judge declined to give this instruction, because he found that Article 2317 was not applicable under the facts of this case.[3]

In *Salve Regina College v. Russell*, supra, this Court held that a court of appeals should review *de novo* such determinations of state law. In this case, however, the standard of review that the Court of Appeal cited in affirming the District Court's determination was the more deferential "abuse of discretion" standard.[4]

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[2] Under Article 2317, the owner of a "thing is not absolved from his strict liability by his ignorance of the condition of the thing or by circumstances that show the defect could not be detected by the ... [owner]." *Ross v. La Coste De Monterville*, 502 So.2d 1026, 1028 (La. 1987); *Entrevia v. Hood*, 427 So.2d 1146, 1148 (La. 1983); *Olsen v. Shell Oil Co.*, 365 So.2d 1285 (La. 1979). Except for the element of the Defendant's scienter, a cause of action for strict liability under Article 2317 is virtually the same as a cause of action for negligence. *Nance v. Gulf Oil Corp.*, 817 F.2d 1176 (5th Cir. 1987); *Kent v. Gulf States Utilities Co.*, 418 So.2d 493 (La. 1982).

[3] It was undisputed that the condition which caused the damage in this case was motor oil, which had leaked onto the floor from a punctured container on K-Mart's display shelf. Plaintiffs contend that K-Mart's ownership and custody of the defective motor oil container supports the application of Louisiana Civil Code Article 2317. However, the trial judge refused to submit this theory of liability to the jury, because he determined that, *as a matter of law*, the motor oil container was not defective within the meaning of Article 2317.

[4] "Abuse of discretion" has been universally recognized as a deferential standard of review. See, e.g., *Pierce v. Underwood*, 487 U.S. 552, 557-63, 108 S.Ct. 2541, 2546-49, 101 L.Ed.2d 490 (1988); *Bennett v. Soo Line Railroad Co.*, 35 F.3d 334, 336, n.4 (8th Cir. 994); *Sheppard & Enoch Pratt Hospital*, 32 F.3d 120, 124 (4th Cir. 1994); *Lutheran Medical*

K-Mart will no doubt adopt the argument of the respondents in *Salve Regina College v. Russell,* supra, that the court of Appeals did in fact engage in a *de novo* review, even though it only articulated the deferential "abuse of discretion" standard. However, as the Court observed in *Salve Regina College v. Russell,* supra, this argument is an invitation "to assume that courts of appeals craft their opinions disingenuously." *Id.,* 111 S.Ct. at 1223. If the Court of Appeals had performed in a *de novo* review of the applicable Louisiana law, it would surely have said so, rather than stating that it found no abuse of the trial judge's discretion.

The Fifth Circuit has cited *Salve Regina College v. Russell,* supra, in numerous cases for the proposition that it must review a district court's determinations of state law *de novo. See, e.g., Labiche v. Legal Security Life Insurance Co.,* 31 F.3d 350, 351 (5th Cir. 1994) ("the apportionment of recovery costs under state law is a legal issue that we review *de novo.*"); *Resolution Trust Corp. v. United States Fidelity & Guaranty Co.,* 27 F.3d 122, 125 (5th Cir. 1994) ("We review the district court's interpretation of state law de novo."); *Folks v. Kirby Forest Industries, Inc.,* 10 F.3d 1173 (5th Cir. 1994); *Hans Constructin Co. v. Phoenix Assurance Co. of New York,* 995 F.2d 53, 55 (5th Cir. 1993) ("[T]he district court's interpretations of applicable

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(footnote 4 continued)
Center of Omaha, Nebraska v. Contractors, Laborers, Teamsters & Engineers Health & Welfare Plan, 25 F.3d 616, 620 (8th Cir. 1994); *In re Rasbury,* 24 F.3d 159, 166 (11th Cir. 1994); *Klonowski v. International Armament Corp.,* 17 F.3d 992, 995 (7th Cir. 1994); *Interstate Power Co. v. Kansas City Power & Light Co.,* 992 F.2d 804, 807 (8th Cir. 1993); *Craddock v. Immigration & Naturalization Service,* 997 F.2d 1176, 1179 (6th Cir. 1993); *Wilfong v. U.S.,* 991 F.2d 359, 364 (7th Cir. 1993).

Mississippi law are reviewed by this court *de novo.*"); *Nesom v. Tri Hawk International* 985 F.2d 208, 209 (5th Cir. 1993) ("This Court will interpret questions of state law 'de novo'.")

In *Folks v. Kirby Forest Industries, Inc.,* supra, the Fifth Circuit reviewed a district court's refusal to give a requested jury instruction under circumstances which were remarkably similar to the present case. In that case, the defendant requested an instruction that the plaintiff was required to prove the defendant's actual or constructive knowledge of a dangerous condition on its premises in order to recover. The district court refused to give the instruction, because it found that it did not accurately reflect Texas law.

In reviewing the district court's refusal to give the requested instruction, the Fifth Circuit set forth the standard of review, as follows:

> "In diversity actions, federal court jury instructions must accurately describe the applicable state substantive law." *Turlington, v. Phillips Petroleum Co.,* 795 F.2d 434, 441-42 (5th Cir. 1986). We review de novo a district court's determination of a question of state law. *City Pub. Serv. Bd. v. Gen. Elec. Co.,* 935 Fl.2d 78, 80 (5th Cir. 1991) (citing *Salve Regina College v. Russell,* 499 U.S. 225, 238, 111 S.Ct. 1217, 1225, 113 L.Ed.2d 190 (1991)), *modified on other grounds,* 947 F.2d 747, 748 (5th Cir. 1991). "'A party is entitled to reversal of a district court's failure to give a particularly requested instruction only if the jury was misled by the instruc-

> tions that were actually given'" *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 425 (5th Cir. 1985). '[W]e afford our district courts latitude inpresenting state law *as long as that presentation is substantively correct.*" *Turlington*, 795 F.2d at 442 (emphasis added)." *Id.*, at 1175.

In this case, the District Court gave the kind of instruction that was requested by the defendant in *Folks v. Kirby Forest Industries, Inc.*, supra. In affirming the District Court's refusal to give an additional instruction that scienter was not an element of recovery under Louisiana Civil Code Article 2317, the Court of Appeal held:

> "Given the nature of the evidence in this case and the absence of controlling Louisiana cases supporting appellant's position, *we cannot say that the district court abused its discretion* in not giving the jury instructions on strict liability." [emphasis added.]

Unlike the decision in *Folks v. Kirby Forest Industries, Inc.*, supra, there is nothing in the language of the Court of Appeals' decision in this case to suggest that it employed different standards in reviewing the District Court's refusal to give a requested instruction and its underlying determination of the applicable state law. Furthermore, the Court of Appeals' decision not to publish its decision is a clear indication that it did not engage in a *de novo* determination of underlying Louisiana Law.

Rule 47.5 of the Local Rules of the Fifth Circuit provides that opinions should be published unless they "have no precedential value and merely decide particular cases on

the basis of well-settled principles of law."[5] The decision in this case satisfies these standards for withholding publication insofar as the Court of Appeal applied the well-settled principle that a trial judge's refusal to give a requested jury instruction is reviewed for abuse of discretion. *See Jackson v. Taylor,* 912 F.2d 795, 798 (5th Cir. 1990). However, the same could not be said of the opinion, if the Court of Appeal had made a *de novo* determination of unsettled Louisiana law under *Erie Railroad Co. v. Tom-*

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[5] Local Rule 47.5.1 provides:

47.5.1 Criteria for Publication. The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that in any way interest persons other than the parties to a case should be published if it:

establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked;

applies an established rule of law to facts significantly different from those in previous published opinions applying the rule;

explains, criticizes, or reviews the history of existing decisional or enacted law;

creates or resolves a conflict of authority either within the circuit or between this circuit and another;

concerns or discusses a factual or legal issue of significant public interest;

is rendered in a case that has previously been reviewed and its merits addressed by an opinion of the United States Supreme Court.

An opinion may also be published if it:

is accompanied by a concurring or dissenting opinion;

reverses the decision below or affirms it upon different grounds."

pkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1930).

In support of the application of Louisiana Civil Code Article 2317, Plaintiffs relied upon the decison of United States District Judge Veronica D. Wicker in *LeBlanc v. K-Mart Corp.,* 1993 WL 262645 (E.D. La. 1993), affirmed, No. 93-3503 (5th Cir. 1994). In that case, the Plaintiff was injured in K-Mart's Houma, Louisiana store, when she slipped on an oily substance. The substance was later determined to be "Goo-Gone," a petroleum-based cleaning compound that had spilled from a broken bottle on a nearby shelf. Judge Wicker held that in addition to its liability under La.R.S. 9:2800.6, K-Mart could be held liable under Louisiana Civil Code Article 2317, explaining:

> "R.S. 9:2800.6 specifically states that it shall not be construed to affect any liability the merchant may have under the strict liability articles, including La.Civil Code Art. 2317. To establish liability under Art. 2317, a plaintiff must prove that the property which caused the damage was in defendant's custody, that the property was defective because it had a condition that created an unreasonable risk of harm to persons on the premises, and that the defect on the property was a cause-in-fact of the resulting injury. In strict liability cases the defendant is relieved of proving that the owner or person in custody either knew or should have known of the defective condition. See *Holden v. Winn-Dixie Louisiana, Inc.,* 532 So.2d 532 (La.App.1 Cir. 1988).
>
> "Therefore, the Court concludes in the

> alternative that K-Mart had a defective product in its care, custody and control — specifically, the bottle of Goo-Gone which broke — and that the resultant spill created an unreasonable risk of harm which caused plaintff's fall and injury." *Id.*, at 3.

The Court of Appeals rejected Judge Wicker's decision in *LeBlanc v. K-Mart Corp.*, supra, as authority for the proposition that a jury instruction on strict liability was warranted under the facts of this case, explaining:

> "The Fifth Circuit, in another unpublished opinion, affirmed the district court judgment on the grounds that K-Mart had failed to establish clean-up procedure. *LeBlanc v. K-Mart*, 93-3503 at 3 (5th Cir. March 3, 1994). The opinion did not mention strict liability.
>
> *Our research has found no Louisiana Supreme Court or intermediate appellate court case that definitively confirms or contradicts the analysis of 2317 in the LeBlanc lower court's decision.*" [emphasis added.]

An *Erie* determination of state law for which there is no "definitively" confirming[6] or contradictory state court

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[6] The Court of Appeals also rejected *Schexnider v. Winn Dixie Louisiana, Inc.*, 490 So.2d 1095 (La.App.3rd Cir. 1986), writ denied 491 So.2d 381 (La. 1986) as adequate authority for the application of Louisiana Civil Code Article 2317 on the grounds that although the Plaintiff in that case had argued its application to a leaking bottle, the court did not impose liability under Article 2317, because it found that there was no evidence of a defect in the bottle.

authority can hardly be deemed a "well-settled principle of law." If the Court of Appeal had engaged in a *de novo* determination of state law, as opposed to simply explaining the basis for its deferential finding that the District Court had not "abused its discretion," it would surely have deemed its decision worthy of publication under the criteria set forth in its Local Rule 47.5.

In *Wilson v. Seiter,*[7] this Court held that the "deliberate indifference" standard applied to medical care in *Estelle v. Gamble*[8] applies generally to prisoner challenges to conditions of confinement, rather than the more stringent "wantonness" standard, which was applied to a claim of cruel and unusual punishment in *Whitley v. Albers.*[9] The Court vacated the judgment of the court of appeal in that case and remanded it for reconsideration under the appropriate standard, explaining:

> "After disposing of the three claims on the basis of *Rhodes,* the Court of Appeals proceeded to uphold the District Court's dismissal of petitioner's remaining claims on the ground that his affidavits failed to establish the requisite culpable state of mind. The critical portion of its opinion reads as follows:
>
> '[T]he *Whitley* standard of obduracy and wantonness requires behavior marked by persistent malicious cruelty. The record

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[7] 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991).

[8] 429 U.S. 97, 106, 97 S.Ct. 285, 292, 50 L.Ed.2d 251 (1976).

[9] 475 U.S. 312, 319, 106 S.Ct. 1078, 1084, 89 L.Ed.2d 251 (1986).

> before us simply fails to assert facts suggesting such behavior. At best, appellants' claim evidences negligence on appellees' parts in implementing standards for maintaining conditions. Negligence, clearly, is inadequate to support an eighth amendment claim.' 893 F.2d, at 867.
>
> It appears from this, and from the consistent reference to 'the *Whitley* standard' elsewhere in the opinion, that the court believed that the criterion of liability was whether the respondents acted 'maliciously and sadistically for the very purpose of causing harm,' *Whitley,* 475 U.S., at 320-321, 106 S.Ct., at 1085. To be sure, mere negligence would satisfy neither that nor the more lenient 'deliberate indifference' standard, so that any error on the point may have been harmless. Conceivably, however, the court would have given further thought to its finding of '[a]t best. . .negligence' if it realized that was not merely an argument *a fortiori,* but a determination almost essential to the judgment. Out of an abundance of caution, we vacate the judgment of the Sixth Circuit and remand the case for reconsideration under the appropriate standard." *Id.*, 111 S.Ct., at 2327-28.

The reasoning applies in this case and supports the same result. In *Salve Regina College v. Russell,* supra, the Court recognized that in most cases an appellate court's application of a deferential standard of review would be harmless, because "the mandate of independent review will alter the appellate outcome only in those few cases where the appellate could would resolve an unsettled issue of state law differently from the district court's resolution,

but cannot conclude that the district court's determination constitutes clear error." *Id.*, 111 S.Ct., at 1224. Nevertheless, the Court held that "[w]hen *de novo* review is compelled, no form of appellate deference is acceptable." *Id.* This is so, because "[i]ndependent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration." *Id.*, 111 S.Ct., at 1221.

Whether or not the Court of Appeal would have reached a different result upon reviewing the District Court's determination of underlying Louisiana law *de novo* it is conceivable that the Court of Appeal would have given further thought to its finding if it had realized that rather than evaluating an exercise of the District Court's discretion, it was making a definitive determination of Louisiana law under *Erie*. The judgment of the Court of Appeals should therefore be vacated, and this matter should be remanded for reconsideration under the appropriate standard, as was done in *Wilson v. Seiter*, supra.

CONCLUSIONS

The duty of the Court of Appeals to review the District Court's determinations of state law *de novo* has been clearly established by this Court's decision in *Salve Regina College v. Russell*, supra. The perceived benefits of plenary appellate review have been deemed sufficient to support the imposition of a rule, which admits to no exception for "harmless error."

The language of the Fifth Circuit's opinion in this case and the decision not to publish it clearly indicate that *de novo* review was not performed in this case. The judgment of the Court of Appeals should therefore be vacated, and this matter should be remanded for reconsideration under the appropriate standard of review.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40378
Summary Calendar

FILED
JAN 05 1995

DUANE LINUS ROMERO, SR., DARLENE ROMERO and LINUS DUANE ROMERO, SR., as the Administrator of the Estate of his Minor Children, LINUS DUANE ROMERO, JR., BRIDGET ROMERO and HOPE ROMERO,

Plaintiff-Appellant,

versus

K-MART CORPORATION, d/b/a K-MART DISCOUNT STORE NO. 7061,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(6:93-CV-292)

Before JOLLY, WIENER and STEWART, Circuit Judges.

PER CURIAM:*

Linus Romero and his family appeal the judgment of the district court denying their motion for a new trial on the basis of the court's failure to give proffered jury instructions on strict liability at trial. For the following reasons, the judgment of the district court is affirmed.

BACKGROUND

Linus Romero and his family (collectively "Romero") filed suit against the K-mart Corporation ("K-mart") to recover damages resulting from Linus Romero's slip and fall on April 5, 1992 in a K-mart store in New Iberia, Louisiana. The slip and fall was caused by motor oil on the floor of the store's automotive department.

A jury trial was held on November 18, 1993. Although the court instructed the jury on Louisiana's law of negligence, the court refused, despite Romero's request, to instruct the jury on Louisiana's law on strict liability. The jury returned a verdict for K-mart. Romero filed a motion for a new trial based on the court's failure to give the proffered jury instructions. The district court denied the motion. It found that the jury instructions were not warranted by the facts and that the request for the jury instructions was untimely. Romero appeals the judgment of the district court.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

DISCUSSION

Romero slipped and fell in K-mart's automotive section. Motor oil was found on the soles of his shoes and an open container of motor oil was located on a shelf in the vicinity of the fall. He alleged in his compiaint that a K-mart employee escorted him through the area where he slipped and that the store was negligent in permitting the oil to collect and remain on the automotive department's floor. Such carelessness and negligence by the store breached its duty to him to provide and maintain safe passageways for its customers. Having been injured as a result of K-mart's breach of this duty, Romero sued to recover damages. Shortly before trial, Romero asserted during the pre-trial proceedings that he also intended to pursue a strict liability claim pursuant to La. Civ. Code art. 2317. Upon objection by K-mart, the district court denied Romero's request for jury instructions on strict liability. The case was tried on the negligence claim with the jury rendering a judgment for K-mart.

In order to have a jury instructed on a possible theory of the case, the instruction must be legally correct, the theory must be supported by the evidence, and the desired instruction must be brought to the court's attention in a timely manner. *Pierce v. Ramsey Winch Co.,* 753 F.2d 416, 425 n.10 (5th Cir. 1985). A decision not to give a jury instruction will not be reversed absent an abuse of discretion. *Jackson v. Taylor,* 912 F.2d 795, 798 (5th Cir. 1990).

In order to recover under strict liability, a thing which allegedly caused damages must be under the custody

of the defendant, the thing must have a defect or a vice, and the defect or vice must cause the damages. *Loescher v. Parr,* 324 So.2d 441 (La. Ct. App. 1976). A defect is some condition that inheres in the thing as one of its qualities that creates an unreasonable risk of harm to others. *Crane v. Exxon Corp., USA,* 613 So.2d 214, 219 (La. Ct. App. 1992).

Slip and fall cases are usually litigated as accidents caused by a hazardous condition *on* the premises or *in* the premises. *See e.g., Edwards v. K & B Inc.,* 641 So.2d 1040 (La. Ct. App. 1994); *Choyce v. Sisters of Incarnate Word,* 642 So.2d 287 (La. Ct. App. 1994); *Tobin v. Wal-Mart,* 575 So.2d 946 (La. Ct. App. 1991). If the hazardous condition was *in* the premises then instructions on strict liability and negligence are warranted; if the hazardous condition is *on* the premises then an instruction only on negligence is warranted. *Edwards v. K & B Inc.,* 641 So.2d 1040, 1044 (La. Ct. App. 1994).

The merchant's duty in a slip and fall case, is to keep his aisles, passageways, and floors in a reasonably safe condition. La. Rev. Stat. § 9:2800.6.[1] If a hazardous condition

---

[1] The pertinent provisions of La. Rev. Stat. § 9:2800.6 are as follows:

> A. A merchant owes a duty to person who uses his premises to exercise reasonable care to keep his aisles, passageways, and floors in a reasonably safe condition. This duty includes a reasonable effort to keep the premises free of any hazardous conditions which reasonably might give rise to damage.
>
> B. In a negligence claim brought against a merchant by a person lawfully on the merchant's premises for damages as a result of an injury, death, or loss sustained because of

arises that causes a slip and fall, the merchant has the duty of proving that it was exercising reasonable care through the existence of adequate clean-up procedures. *Courville v. Piggly Wiggly Bunkie Co.*, 614 So.2d 1366 (La. Ct. App. 1993). In this case, the motor oil would have been a hazardous condition on the premises warranting instructions only on negligence and on La. Rev. Stat. § 9:2800.6, which were the instructions given to the jury, *see Marshall v. A & P Food Co. of Tallulah*, 587 So.2d 103, 107 (La. Ct. App. 1991).

The only case brought to our attention that seems to hold that a jury instruction on strict liability was warranted under these circumstances is the unpublished opinion, *LeBlanc v. K-mart Corporation*, 1993 WL 262645 (E.D. La. July 2, 1993).[2] In *LeBlanc*, the plaintiff had slip

---

(footnote 1 continued)

> a fall due to a condition existing in or on a merchant's premises, the claimant shall have the burden of proving, and in addition to all other elements of his cause of action, that:
>
> (1) The condition presented an unreasonable risk of harm to the claimant and that risk of harm was reasonably foreseeable;
>
> (2) The merchant either created or had actual or constructive notice of the condition which caused the damage, prior to the occurrence; and
>
> (3) The merchant failed to exercise reasonable care.

[2] Romero has also cited *Schexnider v. Winn Dixie Louisiana, Inc.*, 490 So.2d 1095 (La. Ct. App. 1986), as support for the proposition that strict liability is a possible theory of recovery for a slip and fall caused by leakage from a bottle. The court in that case did not address whether these facts could support liability under La. Civ. Code art. 2317, it simply stated that there was no evidence that would support the argument

ped and fallen in a puddle of a petroleum-based cleaning product that had spilled from a bottle on a shelf. After a bench trial, the trial court found the defendant had failed to meet its burden of proof in establishing the existence of clean-up procedures for spills, pursuant to its duty under La. Rev. Stat. § 9:2800.6. Without any citation to authority, the court also found that the defendant was liable under La. Civ. Code art. 2317 because the bottle was broken and therefore defective. *Id.* at 3. The Fifth Circuit, in another unpublished opinion, affirmed the district court judgment on the grounds that K-mart had failed to establish clean-up procedure. *LeBlanc v. K-mart,* 93-3503 at 3 (5th Cir. March 3, 1994). The opinion did not mention strict liability.

Our research has found no Louisiana Supreme Court or intermediate appellate court case that definitively confirms or contradicts the analysis of 2317 in the *LeBlanc* lower court's decision. The closest case we have found is *Touissant v. Guide,* 414 So.2d 850 (La. Ct. App. 1989). In this case, the plaintiff's home had been destroyed by a fire which had originated from a neighbor's home. The plaintiff sued his neighbor under La. Civ. Code art. 2317 on the theory that the fire was a defect in the home. The court found that the fire was not a defect because it was not a quality of the house, but was an extraneous force. *Id.* at 852. It held that La. Civ. Code art. 2317 was inapplicable unless the fire had been caused by some quality of the house. *Id.* Similarly, it can be argued that the puncture in the can is not a quality of the can, but was caused by some extraneous force, *i.e.,* the K-mart employee or a customer

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(footnote 2 continued)
and summarily dismissed plaintiff's arguments. *Id.* at 1097.

who had punctured the oil can. Thus, liability would not lie unless some quality of the can caused the puncture.

Given the nature of the evidence presented in this case and the absence of controlling Louisiana cases supporting appellant's position, we cannot say that the district court abused its discretion in not giving the jury instructions on strict liability.

CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-40378

FILED
FEB 15 1995

DUANE LINUS ROMERO, SR., DARLENE ROMERO and LINUS DUANE ROMERO, SR., as the administrator of the estates of his minor children, LINUS DUANE ROMERO, JR., BRIDGET ROMERO and HOPE ROMERO,

Plaintiff-Appellant,

versus

K-MART CORPORATION, d/b/a K-MART DISCOUNT STORE NO. 7061,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 01/05/95, 5 Cir., , F.3d)

(February 15, 1995)

Before JOLLY, WIENER and STEWART, Circuit Judges.

RECEIVED - FEB 16 1995

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one, of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP) and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart

United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDAT.

APPENDIX C

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

FILED
NOV 29 1993

LINUS DUANE ROMERO, SR. ET AL	CIVIL ACTION NO. 93-0292
VERSUS	JUDGE SHAW
K-MART CORPORATION, d/b/a K-Mart Discount Store No. 7061	MAGISTRATE JUDGE METHVIN

JUDGMENT

This action came on for trial before the Court and a jury, District Judge John M. Shaw, presiding, and the issues having been duly tried, and the jury having rendered its verdict on special interrogatories,

Now, therefore, in accordance with the verdict of the jury, JUDGMENT IS HEREBY RENDERED in favor of defendant, K-MART CORPORATION, d/b/a K-Mart Discount Store No. 7061, and against plaintiffs LINUS

RECEIVED
DEC 02 1993

DUANE ROMERO, SR., DARLENE ROMERO, LINUS DUANE ROMERO, JR., BRIDGET ROMERO and HOPE ROMERO dismissing all claims with prejudice, at plaintiffs' costs.

Thus Done and signed at Lafayette, Louisiana, this 19th day of November, 1993.

ROBERT H. SHEMWELL
CLERK OF COURT

By: /s/ Ronald G. Weathers
Deputy Clerk

JUDGEMENT ENTERED 11-30-93
BY NC
COPY TO Curtis
MacDonald

APPROVED AS TO FORM:

/s/John Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUN 22 1995
OFFICE OF THE CLERK

(2)

No. 94-1896

In The
SUPREME COURT of the UNITED STATES
October Term, 1994

LINUS DUANE ROMERO, SR. and
DARLENE ROMERO

Petitioners,

versus

KMART CORPORATION, d/b/a
KMART DISCOUNT STORE NO. 7061

Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals,
Louisiana Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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BEST AVAILABLE COPY

16 pp

QUESTION PRESENTED FOR REVIEW

Did the Fifth Circuit Court of Appeals apply the correct standard of review in affirming the district court's denial of petitioners' request to instruct the jury on the theory of strict liability under La. Civ. Code art. 2317 for a claim arising from a slip and fall accident?

TABLE OF CONTENTS

Page

Question Presented for Review i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Statute Involved 2

Statement of the Case 2

Summary of Argument 3

Argument 4

1. The Fifth Circuit performed a de novo review of the district court's decision 4

2. The Fifth Circuit correctly reviewed the district court's refusal to instruct the jury on strict liability for an abuse of discretion, because that decision was based in part on enforcement of a court rule 8

Conclusion 9

Appendix A 10

TABLE OF AUTHORITIES

Page

CASES

Pierce v. Underwood, 487 U.S. 552, 558, 108 S. Ct. 2541, 2547, 101 L.Ed.2d 490 (1988) . . 8

Salve Regina College v. Russell, 499 U.S. 225, 238, 111 S. Ct. 1217, 1221, 1222, 113 L.Ed.2d 190 (1991) 5, 6, 7

STATUTES

La. Civ. Code art. 2317 . . . . . 2, 3, 5

La. R.S. 9:2800.6 . . . . . 5, 6

No. 94-1896

In The
SUPREME COURT of the UNITED STATES
October Term, 1994

LINUS DUANE ROMERO, SR. and
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Petitioners,

versus

KMART CORPORATION, d/b/a
KMART DISCOUNT STORE NO. 7061
Respondent.

On Petition For Writ of Certiorari
To The Court of Appeals,
Louisiana Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

Respondent, Kmart Corporation [1], respectfully requests that this court deny the Petition for Writ of Certiorari which seeks review of the Fifth Circuit Court of Appeals' opinion below. That opinion is unpublished

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[1]The full list of parties is included in the "parties" section of the Petition for Certiorari.

but reported at 44 F.3d 1005 (5th Cir. 1995) and 48 F.3d 533 (5th Cir. 1995), and is printed in the Petition for Writ of Certiorari at Appendix A and B.

STATUTE INVOLVED

The statute involved is La. Civ. Code art. 2317.

STATEMENT OF THE CASE

Kmart does not dispute Linus Duane Romero, Jr. and Darlene Romeros' recitation of the statement of the case, except to add the following. The Romeros first raised the issue of strict liability in their response to pre-trial order, which was submitted after all pre-trial deadlines had passed. Kmart objected to the addition of this theory at the final pre-trial conference. The district court offered the Romeros the opportunity to continue the trial in order to amend their complaint and allow Kmart time to prepare a defense. They declined. The district court then denied the Romeros' request to instruct the jury on strict liability, because the instructions were not warranted by the facts and the issue was not timely raised.

At the trial's conclusion, the jury found Kmart was not negligent, and the Romeros' claims were dismissed at their costs. The Romeros moved for a new trial based on, among other things, the district court's failure to instruct the jury on their strict liability claim under Article 2317. The district court gave two reasons for

denying that motion. First, the temporary condition of oil on the floor or a puncture in an oil container do not constitute a defect under La. Civ. Code art. 2317. Second, the Romeros did not timely give Kmart notice of their intention to raise a claim of strict liability within the deadlines provided under the court's rules. (Appendix A)

In its January 5, 1995 opinion, the Fifth Circuit Court of Appeals affirmed the district court's decision after an analysis of the applicable authorities. The Romeros' request for a rehearing en banc was denied with no active judge voting in favor of the rehearing.

In this petition, the Romeros argue the Fifth Circuit committed reversible error by applying an incorrect standard of review when analyzing the district court's decision. Specifically, the Romeros contend the Fifth Circuit reviewed the district court's decision under the deferential "abuse of discretion" standard rather than the plenary *de novo* standard. A review of the Fifth Circuit's opinion reveals, however, that it did in fact conduct a *de novo* review. Furthermore, the Fifth Circuit appropriately reviewed the district court's enforcement of its own rules for abuse of discretion. Therefore, certiorari should be denied.

SUMMARY OF ARGUMENT

The Romeros failed to satisfy the criteria necessary to invoke this court's discretionary jurisdiction, because the Fifth Circuit's opinion reflects a *de novo* review of the district court's decision.

Any deference by the Fifth Circuit Court of Appeals in affirming the district court's decision was appropriate, because the district court's enforcement of its pre-trial rules is reversible only if it represents an abuse of discretion.

ARGUMENT

1. The Fifth Circuit performed a de novo review of the district court's decision.

In an effort to obtain review here, the Romeros have mischaracterized the nature of the Fifth Circuit's review and analysis of the district court's decision not to charge the jury on strict liability. Focusing only on the Fifth Circuit's statement that the district court did not abuse its discretion in not giving the jury instructions on strict liability and its failure to publish the opinion rather than the court's analysis of the district court's decision, the Romeros suggests the Fifth Circuit reviewed the entire district court decision for an abuse of discretion, rather than conducting a *de novo* review. This suggestion is incorrect.

The district court's determination of a question of state law is reviewed *de novo* on appeal. A *de novo* review necessarily entails an independent and careful consideration of the district court's legal analysis. Any expertise the district court possesses will inform the structure and content of its conclusions of law and thereby become evident to reviewing court. If the appellate court finds the district court's analytical sophistication and research have exhausted the state law inquiry, little more need be said in the appellate opinion. Unlike a

discretionary review, *de novo* review does not admit unreflected reliance on a lower court's inarticulatable intuitions. Rather, the appellate court's decision will reflect its own considered opinion, even if it is the same as the district court. ***Salve Regina College v. Russell***, 499 U.S. 225, 238, 111 S. Ct. 1217, 1221, 1222, 113 L.Ed.2d 190 (1991).

The Fifth Circuit's opinion affirming the district court's decision evidences a thorough and independent consideration of the applicable legal authorities. Specifically, the opinion includes an exhaustive recitation of the pertinent facts and the applicable legal authorities. The opinion then proceeds to an application of these facts to the law, and a definitive conclusion that La. Civ. Code art. 2317 is inapplicable to the facts of this case. In its explanation of this conclusion, the Fifth Circuit cites the results of its own legal research and the conclusions it drew from that research. Going beyond the district court's limited discussion, the Fifth Circuit reasoned that the motor oil Romero slipped in was a hazardous condition *on the premises* warranting jury instruction only on negligence and on La. R.S. 9:2800.6, which were the instructions the district court gave to the jury.

After concluding La. Civ. Code art. 2317 was inapplicable in this case, the Fifth Circuit engaged in an analysis of the legal authorities the Romeros cite in support of its application. In doing so, the court not only discussed those authorities, but also its reasons for disregarding them. The district court engaged in no such analysis or discussion. In fact, the district court did not address any of the authorities the Romeros cited.

Considering the Fifth Circuit's opinion in its

entirety, it is quickly apparent that it reached its conclusions independently, and without the necessity of deferring to the district court's findings of fact or conclusions of law. If it had not engaged in this *de novo* review, its opinion would have specifically referenced its deference to the district court's decision rather than engaging in an exhaustive review or applicable legal authorities, and then applying them to the undisputed facts of this case. The cursory type of discussion typical of a court applying a deferential standard of review is best evidence by the appellate court's discussion in ***Salve Regina College v. Russell***, 499 U.S. 225, 238, 111 S. Ct. 1217, 1221, 1222, 113 L.Ed.2d 190 (1991). The Fifth Circuit's discussion and analysis of this case bears no resemblance.

The Romeros' contention the Fifth Circuit applied the incorrect standard of review ignores that court's discussion of the facts and law. Rather, the Romeros base their argument solely on the Fifth Circuit's acknowledgement that the district court did not abuse its discretion in refusing to give the jury instructions on strict liability. In doing so, the Romeros confuse the Fifth Circuit's acknowledgement of the district court's discretion in fashioning jury instructions and enforcement of its pre-trial deadlines with the standard applicable to its own review of those instructions. A reading of the decision in context reflects that after a recitation of the facts, the Fifth Circuit recognizes the latitude given the district court when instructing the jury on a possible theory of the case. The court then engages in its own analysis of the principals of strict liability applicable to slip and fall cases such as this. After concluding the facts warranted instructions only on negligence and La. R.S. 9:2800.6 and distinguishing the authorities the Romeros

cite does the court recognize in passing that the district court did not abuse its discretion. In this context, it is evident the Fifth Circuit's reference to the district court's discretion is in part its acknowledgement the district court's analytical sophistication and research exhausted the state law inquiry. It does not represent an unreflected reliance on the district court's decision.

The Romeros also suggest the Fifth Circuit's failure to publish its opinion evidences its failure to apply a *de novo* standard of review. In doing so, they rely entirely on the Fifth Circuit's rejection of dictum contained in an unpublished opinion of a district court decision in another case, because it could find no other case adopting that court's analysis. From this, the Romeros conclude that the Fifth Circuit was compelled to publish its opinion unless it was merely explaining the basis for its deferential finding that the district court had not abused its discretion. This argument, however, ignores fact that the criteria for publication of opinions does not include that court's analysis and disposition of legal authorities which are neither necessary for the disposition of the case or contained in dicta from other cases.[2]

In light of the foregoing, the Romeros failed to satisfy the criteria traditionally applied by this court in determining whether to grant a writ a certiorari. Specifically, this case involves no conflict amongst the Federal circuit courts, the decision is in accord with Supreme Court precedent e.g. ***Salve Regina College v.***

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[2]See Citation of Local Rule 47.51 at p. 9 of the Romeros' Petition.

Russell, 499 U.S. 225, 238, 111 S. Ct. 1217, 1221, 1222, 113 L.Ed.2d 190 (1991), and it presents no conflict with any law. Further, the facts in this proceeding are sufficiently unique that their precedential value are likely to be minimal.

2. The Fifth Circuit correctly reviewed the district court's refusal to instruct the jury on strict liability for an abuse of discretion, because that decision was based in part on enforcement of a court rule.

An appellate court will review a district court's decision involving issues of supervision over the litigation for abuse of discretion. *Pierce v. Underwood*, 487 U.S. 552, 558, 108 S. Ct. 2541, 2547, 101 L.Ed.2d 490 (1988). As the Fifth Circuit recognized, the district court's refusal to charge the jury on strict liability was also based on their failure to timely raise that claim, a point the Romeros' writ application omits. Therefore, the Fifth Circuit's review of the district court's decision necessarily included a determination of whether it abused its discretion in enforcing its deadline. In light of its recognition that this was one of the basis for the district court's refusal to instruct the jury on strict liability, the Fifth Circuit's conclusion that the district court did not abuse its discretion in not giving the jury instructions on strict liability is consistent with the applicable standard of review.

CONCLUSION

Accordingly, for all the foregoing reasons, the petitioners' request for writ of certiorari should be denied.

Respectfully submitted,

PERRET, DOISE, DAIGLE,
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APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

Linus Duane Romero, Sr., et al	Civil Action No.: 93-0292
v.	Judge Shaw
Kmart Corporation	Magistrate Judge Methvin

****

RULING

Now before the court is a motion for new trial filed by plaintiffs, Linus Duane Romero, Sr. and Darlene Romero, pursuant to Rule 59 of the Federal Rules of Civil Procedure.

Although Rule 59(a) provides the authority for granting a motion for new trial, it does not set forth the various grounds upon which a court may grant a new trial. Among the grounds commonly used are those that the verdict is against the weight of the evidence, the damages are excessive, or that for other reasons the trial was not fair. Bazile v. Bisso Marine Company, Inc., 606 F.2d 101 (5th Cir. 1979); *Smith v. Transworld Drilling Company*, 773 F.2d 610 (5th Cir. 1985); *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S. Ct. 189, 85 L.Ed. 147 (1940).

In this case the plaintiffs have stated two basis for their motion: (1) The trial was not fair because the court failed to instruct the jury on plaintiffs' article 2317 claim; and (2) The verdict was against the weight of the evidence.

The court struck the plaintiffs' claim under La. Civil Code article 2317, for strict liability, for two reasons: (1) Strict liability has no application to the facts as alleged in this case; and (2) Plaintiffs did not state strict liability as a theory of recovery in any pleading to give notice that he was proceeding with such a claim, and did not notify the defendant that he was proceeding with a strict liability claim until after discovery was complete. The defendant's first notice of such a claim was in the pretrial order prepared just prior to the pretrial conference, three weeks prior to trial.

Strict liability does not apply to cases in which there is a temporary presence of a substance on a premise. The presence of a foreign substance does not create a vice or defect inherent in the thing itself to give rise to a claim in strict liability. *Simmons v. City of Monroe*, 22393 (La. App. 2d Cir. 10/30/91) 588 So. 2d 1357; *Goleman v. Kroger & Company, Inc.*, 84-43 (La. App. 3d Cir. 1/30/85) 462 So. 2d 1330.

The temporary condition of oil on the floor or the puncture in the oil container do not constitute a defect under La. Civil Code article 2317.

Secondly, the plaintiff did not timely give notice to the defendant of his intention to raise a claim of strict liability within the deadlines provided under this court's rules.

With respect to the plaintiffs' motion for new trial on the basis that the verdict is against the weight of the evidence, this court finds that the facts presented, more than adequately, support the jury's verdict in this case.

The evidence at trial supported various inferences for the jury to resolve. It is within the jury's province to weight the evidence and accept the testimony which it finds credible. This court will not substitute its own finding for that of the jury. This court finds that the jury verdict is supported by the record.

Accordingly, for the reasons stated herein, the motion for new trial filed by the plaintiffs, Linus Duane Romero, Sr. and Darlene Romero, is DENIED.

Lafayette, Louisiana, March 25, 1994.

s/John M. Shaw
John M. Shaw
United States District Judge

Judgement Entered 3/28/94
By: sjd
Copy to: Curtis
Macdonald